

Claimant began working for respondent as a temporary worker, assigned to the Valassis Inserts plant during the last week of November 1998. During that week, claimant alleges that, while dumping bad inserts into a shredder machine, he injured his low back. Initially, claimant did not report the injury because he thought it was similar to previous back injuries from which he had recovered. However, during the period December 1, 1998, through December 7, 1998, claimant's back continued to worsen. By December 7, 1998,

claimant found he could no longer complete his work and, after suffering three hours of back pain, went home. Claimant advised his supervisor, Teresa, that he was going home because his back hurt. However, claimant did not tell his supervisor that his back pain was due to a work-related accident.

Respondent's Exhibit 1 to the preliminary hearing of April 8, 1999, indicates that claimant left early due to back pain. The exhibit stated it was unknown, at that time, whether it was related to claimant's work. Respondent's December 9, 1998, office note indicated that claimant said his symptoms were not related to his work.

Respondent was provided an off work slip on December 15, 1998, indicating claimant would be off work through December 20, 1998, due to back pain. On December 21, 1998, claimant was released to return to work. Respondent's documentation continued to indicate claimant's back pain was not related to his work.

The first indication that this was a work-related injury occurred on December 28, 1998, when claimant contacted Steve Lindeman, respondent's branch manager, and requested that he be allowed to fill out a workers' compensation form. When Mr. Lindeman looked at the file, he discovered the multiple entries indicating that this was a non-work-related situation, and advised claimant that the injury was indicated as non-work-related. Claimant then left respondent's plant. Mr. Lindeman also talked to claimant's brother, Larry, about whether this was a workers' compensation claim. During that conversation, claimant's brother threatened to hire an attorney. On January 6, 1999, claimant filled out a workers' compensation claim form.

There was evidence in the record that, around December 7, 1998, claimant did some auto mechanic's work on his car. However, claimant testified that the work was done primarily by his brother and a friend. Claimant said he did little or no actual physical labor on the car.

Claimant first sought treatment from John E. Lemon, D.C., on December 8, 1998. During that week, claimant talked to Cindy, an employee of Valassis, and may have advised her that he injured himself at work, but claimant was not sure. On December 8, 1998, claimant filled out an accident information form in Dr. Lemon's office. Next to the question regarding whether this was work-related, claimant marked no. On December 21, 1998, Dr. Lemon released claimant to full duty without restrictions, but claimant continued to be in severe pain, alleging he was unable to work. Claimant has neither sought nor accepted any employment since his last day of employment with respondent on December 7, 1998.

Claimant received chiropractic care from Dr. David Souder and care from his family physician, Dr. Peter DeWitt. Both Dr. Souder and Dr. DeWitt have returned claimant to work without any restrictions. Claimant, however, continues to allege he can only stand three to four minutes, due to the pain.

The record indicates claimant suffered several prior back injuries, including an injury while attending welding school in Utah in 1987 or 1988, and two low back injuries claimed against Sirloin Stockade in 1990 and 1991. Claimant's work-related injuries, including those at Sirloin Stockade, were reported immediately to his then current employers.

Evidence in the record indicates claimant was aware of the reporting requirements under the Workers Compensation Act. The personnel handbook discussed the fact that claimant had ten days within which to report the accident. In addition, the staff manager at Valassis Inserts testified that workers' compensation notice forms were posted throughout the plant in conspicuous places.

Claimant also contends that he was unable to fully comprehend the requirements of the Workers Compensation Act, as he was early on identified as a special education student. Claimant apparently did attend several special education classes while in grade school, but during his four years in high school, required only one special education class to graduate.

Finally, claimant is unclear as to when he talked to respondent's representatives and what he said. Claimant does allege that he talked to Mr. Lindeman on approximately December 14, 1998. However, when asked whether he told Mr. Lindeman that it was initially non-work-related, claimant indicates he may have. When questioned specifically about whether he was injured while working for respondent, claimant answered "I think so." Mr. Lindeman testified that he had only one contact with claimant, on December 28, 1998, at which time claimant asked if he could fill out a workers' compensation claim form.

The record indicates that claimant suffered a slip and fall in November 1998, just before beginning work with respondent.

In February 1999, claimant was referred to Dr. Paul S. Stein, a neurosurgeon in Wichita, Kansas. Medical tests, including an MRI, diagnosed a herniated disc at L5-S1 on the left side. Dr. Stein recommended and claimant underwent an epidural steroid injection, and claimant may be in need of surgery. In addition, claimant has diabetes and requires two insulin injections per day.

Claimant was interviewed by Janice Pierson, with RiskCo Company, on January 14, 1999. During the interview, claimant was asked whether he had ever had previous back problems. Claimant answered yes, that he had bruised a disc in his back in 1991. However, claimant returned to work after that incident and continued working until the December 1998 incident with respondent. During the interview, claimant denied having any other work-related injuries.

CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, the burden of proof shall be on claimant to establish claimant's right to an award of compensation by proving the

various conditions on which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 1996 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g).

Claimant alleges accidental injury during the first week of his employment with respondent and then through a series of accidents from December 1, 1998, through December 7, 1998. However, claimant failed to inform any member of respondent's staff or of Valassis Inserts' staff of his ongoing problems. Claimant contends he advised respondent on December 8, 1998, of an accident, but acknowledges he did not tell them that it was work-related. In addition, the forms filled out by claimant in Dr. Lemon's office, immediately after the alleged work-related accidents, were marked non-work-related.

Claimant knew to advise respondent immediately of any work-related incidents, but failed to do so in a timely fashion. Finally, claimant earlier suffered three prior work-related accidents and had reported these immediately. Claimant's failure to report this accident immediately is unexplained other than claimant saying he thought the injury would improve. That does not explain why claimant would mark a medical report non-work-related.

After reviewing the evidence, the Appeals Board finds that claimant has failed to prove accidental injury arising out of and in the course of his employment with respondent, and the Order of Administrative Law Judge John D. Clark should be reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated April 8, 1999, should be, and is hereby, reversed, and claimant is denied benefits for the alleged accident occurring December 1, 1998, through December 7, 1998.

IT IS SO ORDERED.

Dated this ____ day of June 1999.

BOARD MEMBER

c: Phillip R. Fields, Wichita, KS
D. Steven Marsh, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director